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Remarks

Executive Secretary
17 May 85

Date

PANEL ON THE LAW OF OCEAN USES

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May 15, 1985

The Honorable William J. Casey
Director
Central Intelligence Agency
Washington, D.C. 20505

Dear Mr. Casey:

I draw your attention to the attached statement on United States Policy on Coastal Areas in the Sea and the Settlement of Disputes. This statement is the result of study by an independent panel of citizens, recognized experts on ocean law. It further develops the recommendations conveyed to your agency in our statement of April 27, 1984, on United States Policy on the Law of the Sea, and is likewise being transmitted to the President of the United States and to members of the Senate and the House of Representatives.

Sincerely,

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Panel on the Law of Ocean Uses

The panel on the law of ocean uses is an independent group of specialists
in oceans law and policy sponsored by Citizens for Ocean Law.

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PANEL ON THE LAW OF OCEAN USES

May 15, 1985

United States Policy on Coastal Areas in the Sea and the Settlement of Disputes

In our initial statement on general oceans policy (April 27, 1984), we recommended that, deep sea-bed mining apart, the United States

--accept the UN Convention on the Law of the Sea as reflecting customary international law, and

--undertake to act in conformity with the provisions of the Convention and seek similar compliance from other states.

We have been gratified to receive assurance from the Administration that Government policy is in conformity with our recommendations. We have urged that that policy be firmly and clearly reiterated and communicated to all the relevant parts of the Executive Branch, to Congress, and, where opportune and appropriate, to the courts.*

In this statement we amplify our general recommendation as it applies to several interrelated elements, namely: the freedom of navigation as affected by special zones of coastal state jurisdiction; the reach of such zones of special coastal state jurisdiction and the character of the coastal state's authority within those zones; and the resolution of disputes in respect of such coastal state authority.

Freedom of Navigation and Coastal State Rights

The freedom of navigation and related freedoms depend on universal respect by both coastal states and maritime states for the geographic limits of zones of special coastal state jurisdiction, and for the character, and limited nature, of the special rights of the coastal state within those zones.

At the Third U.N. Conference on the Law of the Sea, the governments of the world, with the United States playing a

*The policy statement and correspondence with the Administration are published in 79 Am. J. Intl'l L. 151-58 (1985).

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central part, achieved consensus on all of the many provisions dealing with navigation. President Reagan has expressly commended the treatment of navigation and related issues in the Convention.

The challenge for U.S. policy is to maintain that consensus in state practice. To do so, the United States must ensure that its own laws, regulations, interpretations, and judicial decisions are consistent with the provisions of the Convention. If we exceed those limits in any respects, others will feel free to exceed them in those and in other respects.

As regards the geographic limits of coastal state zones, therefore, the United States should claim no more, in form and in effect, than

- a 12-mile territorial sea,

- a 24-mile contiguous zone,

- a 200-mile exclusive economic zone, and

- a continental shelf within the limits set forth in the Convention.

In regard to those zones, in accordance with the Convention:

(a) the United States, as a coastal state, should respect

- the right of innocent passage in its territorial sea,

- the right of transit passage through international straits,

- the freedom of navigation, overflight and related uses in its economic zone, and

- the full freedoms of the high seas beyond the exclusive economic zone, without prejudice to the rights of the United States in its continental shelf seaward of 200 miles as these rights are described in the Convention; and

(b) the United States, as a maritime state, should respect the limitations on its rights and freedoms in the coastal zones of other states.

In addition, the United States, as a global power, should encourage all coastal states to respect the exercise of those rights and freedoms by all maritime states in accordance with the Convention, and should encourage all maritime states to respect the rights of coastal states.

This policy should be communicated in unequivocal terms not only to U.S. Government agencies concerned with foreign affairs, but to Congress and to those charged with interpreting and enforcing U.S. laws at sea, including, in particular, those laws that have a direct bearing on freedom of navigation, such as the regulation of pollution from ships, and programs to interdict smuggling or unauthorized immigration.

The Limits of the Continental Shelf

The Convention defines in complex detail the extent of coastal state jurisdiction over the continental shelf where it extends seaward of 200 miles. That definition represents a collective determination reflecting a delicate compromise as to what constitutes a maximum reasonable claim for the coastal state in light of the other interests affected.

The United States should refrain from making any continental shelf claims that exceed those limits, and should discourage claims beyond those limits by other coastal states in respect of the sea beds off their coasts. Failure to respect that definition will not only create uncertainty and engender disputes as regards the regime of the shelf, but will spill over to the deep sea-bed "beyond national jurisdiction," and the high seas above; it will invite disrespect for the other limits and rules set forth in the Convention.

The Convention sets forth two important obligations related to the limits of the continental shelf:

(a) The coastal state is required to submit to an international commission of experts charts showing any claims to continental shelf beyond 200 miles. The coastal state is not obliged to accept the conclusions of the commission in respect of those claims, but if the commission adopts them, the coastal state's claims become binding on all states. Although the United States, not party to the Convention, is presumably not bound to accept this particular commission and procedure, international review is in the interest of the United States. U.S. participation in that process will act as some restraint on extravagant claims by other states; it will give potential investors in activities on the U.S. shelf an added measure of security.

The United States will not have to decide finally whether to submit its charts until relevant surveys are completed; this will take some considerable time. But the United States should take steps to that end and act on the assumption that it may be submitting such charts to the international commission at an appropriate time.

(b) The Convention also obligates a coastal state to contribute to an international fund a modest percentage of the anticipated economic return from mineral and hydrocarbon

production from the continental shelf seaward of 200-miles. This was the quid pro quo, universally agreed at UNCLOS III, for recognition of coastal state jurisdiction over the continental margin beyond 200 miles.

We believe that it is important for the United States to accept the principle that coastal states must share revenues from the sea-bed of the continental margin beyond 200 miles in the modest percentage set forth in the Convention. Considerations of equity and international cooperation apart, failure to accept the principle could lead to challenges to the claims of the United States to the minerals in the sea-bed of its continental margins seaward of 200 miles, creating uncertainty sufficient to deter or slow investments. Moreover, U.S. failure to accept the duty to share revenues could make it easier for other coastal states to justify their failure to respect other coastal state duties.

The obligation to make payments does not arise until five years after commercial production at a site has commenced, and such production beyond 200-miles is not expected for many years. There will be time to decide how and to what international institutions Congress might appropriate any funds that might become due under this principle.

Settlement of Disputes

In substantial measure, the consensus achieved at the LOS Conference, and particularly the accommodation and balance between the interests of coastal and maritime states, was made possible by agreement to accept various means for settling disputes. The United States in particular saw stability, and the security of its interests at sea, as depending on the willingness of other states, particularly other coastal states, to agree to fair means for settling disputes that might not be resolved through direct diplomatic negotiation. The same considerations make procedures for peaceful settlement important to U.S. interests today.

Especially since the United States has not adhered to the Convention, it will be necessary for the United States to assert rights of navigation vis-a-vis other coastal states, and in some instances to give evidence of determination that may entail some risk of political, economic, or even military conflict. We believe that it is preferable to minimize the circumstances in which, if diplomacy fails, the United States is forced to choose between acquiescence and conflict. It was for that reason that the United States sought a system of compulsory third-party settlement of disputes in the framework of the Convention; we believe that arrangements for compulsory dispute settlement are in the interest of the United States even if -- perhaps especially if -- it is not party to the Convention.

We recommend that the United States announce its willingness to accept, on condition of reciprocity, the obligation to submit

disputes regarding navigation, overflight, and pollution matters to third-party arbitration or adjudication, in the same respects and to the same extent as is required of parties to the Convention. (The Convention excludes certain disputes over coastal fisheries and seabed resources from compulsory arbitration or adjudication and permits exceptions for disputes as to boundaries between neighboring states and military activities.) In promoting such arrangements, the United States might stress that certain coastal state rights, such as control of pollution from ships, were accepted in the Convention on the assumption and condition of compulsory arbitration or adjudication. The United States might also point out that the flag state privilege of transferring certain pollution enforcement proceedings from coastal state courts to flag state courts probably would not have been accorded by the Convention if the flag state were not under a duty to control pollution from its ships that is enforceable through arbitration or adjudication.

It may be desirable to have Congress confirm such a policy by statute.

In respect of navigation and the other issues we have considered, we are satisfied that stability and order at sea can be achieved only on the basis of the rules set forth in the Convention. The opportunity to assure these and other interests of the United States will be jeopardized unless, by the measures we recommend and by other steps, the United States acts promptly and effectively to establish the law of the Convention, and procedures to implement it, as the sea regime for the next century.